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Mary L. Cottrell, Secretary  
Department of Telecommunications & Energy  
Commonwealth of Massachusetts  
One South Station, 2<sup>nd</sup> Floor  
Boston, MA 02110

**Re: D.T.E. 98-57, Phase III**

Dear Ms. Cottrell:

This letter responds to the comments of AT&T, Covad, and WorldCom concerning the Hearing Officer's request for comments on the impact on this proceeding of the D.C. Circuit Court's opinion in *U.S. Telecom Ass'n v. FCC*, 290 F.3d 415 (2002). See Hearing Officer Procedural Memorandum of June 10, 2002. The issue before the Department is whether that decision provides cause for the Department to suspend further proceedings in this case. As discussed in Verizon Massachusetts' ("Verizon MA") June 24<sup>th</sup> comments, the Department should take no further action until the Federal Communications Commission ("FCC") responds to the D.C. Circuit's remand and completes its inquiry concerning the unbundling of advanced services now pending in several dockets.<sup>1</sup> The carriers disagree, and instead urge that the Department not only

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<sup>1</sup> See e.g., *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities and Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, and *Computer III Further Remand Proceedings*, CC Docket Nos. 95-20, 98-10, FCC 02-42, *Notice of Proposed Rulemaking*, ¶¶ 17, 24-27 (rel. Feb. 15, 2002) (FCC tentatively classifies wireline broadband Internet access services, such as DSL, as "information services"); *Review of Regulatory Requirements for Incumbent LEC Broadband Services; SBC Petition for Expedited Ruling That it is Non-Dominant in its Provision of Advanced Services and for Forbearance From Dominant Carrier Regulation of These Services*, CC Docket No. 01-337, FCC 01-360, *Notice of Proposed Rulemaking*, 16 FCC Rcd 22745 (rel. Dec. 20, 2001) (examining whether incumbents that are dominant in the provision of traditional local exchange and exchange access service should also be considered dominant when they provide broadband telecommunications services); *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, *Notice of Proposed Rulemaking*, FCC 01-361, 16 FCC Rcd 22781 (rel. Dec. 20, 2001) (addressing, *inter alia*, the incumbents' obligations under section 251 of the Act

duplicate the FCC's pending inquiries into the unbundling of advanced services, but also expand this case to consider new theories for unbundling and new issues that were not addressed at any point in this case. The Department should not take the bait.

Despite the fact that current FCC rules generally do not require the unbundling of advanced services and that the *US Telecom* decision undercuts any unbundling requirement, the carriers contend that the Department should nevertheless continue with this investigation. Rather than relying on the FCC's rules, they now argue that the Department should independently find that unbundling Verizon MA's proposed Packet At the Remote Terminal Service ("PARTS") or PARTS-like wholesale data packet service is required under the Act or should be required as a matter of state law. See AT&T Comments at 8-13; Covad Comments at 3-10; WorldCom Comments at 2-6. In addition, AT&T maintains that the Department must examine CLEC access to and interconnection with "unified" loop functionalities. AT&T Comments at 48. Their claims are wrong on all counts.

First, as discussed in Verizon MA's June 24th comments, the Act requires the FCC to determine ILEC unbundling obligations in the first instance. The FCC has determined the extent of the unbundling obligation for packet switching functions and determined they do not have to be generally unbundled. In the *U.S. Telecom* decision, the D.C. Circuit rejected even the limited unbundling obligation of packet switching under the existing FCC rules. 290 F.3d 428. State commissions are not free to examine unbundling requirements apart from FCC requirements. Section 251(d)(2) of the Act grants to the FCC authority to determine what network elements should be made available and mandates that the FCC shall, when making its determination, engage in the "impairment" analysis. The states cannot "reverse preempt" the FCC's determinations by considering access to unbundled elements where the FCC has considered access to the same elements, as is the case of packet switching. Any state action to consider independently issues addressed by the FCC would ignore the Supreme Court's mandate that the FCC impose "limits" on access to UNEs. *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 392 (1999). A federal limit that can be superseded by the states is no limit at all.<sup>2</sup>

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to make their facilities available as unbundled network elements to competitive carriers for the provision of broadband services).

<sup>2</sup> The carriers point to three state commissions that have required the unbundling of packet switching. See AT&T Comments at 7-8; Covad Comments at 16. Verizon MA believes that these decisions are inconsistent with the Act and the FCC's rules. Moreover, each of the decisions was issued before the *U.S. Telecom* decision, and therefore, could not have applied the "impairment" analysis deemed necessary by the Court to support unbundling under Section 251 of the Act.

Moreover, the Department has never indicated that it would consider unbundling of advanced services independently of the FCC's rules. The Department found in the initial stage of this case that Verizon MA does not have the legal obligation to provide unbundled packet switching at this time unless the FCC conditions set forth in 47 CFR § 51.319(c) (3)(B) were satisfied or the FCC modified its rules. *Phase III Order*, at 88. The Department has not even considered – and the parties did not address – whether unbundling was permissible apart from those rules or the factors that would go into such a determination. If the Department were even entitled to conduct such an inquiry in the first instance, it should not do so because the FCC is well on its way to examining ILEC unbundling obligations in the Triennial Review and must respond to the D.C. Circuit's remand. All the Department could do at this point is duplicate the FCC's proceedings. This would be a waste of resources since the Department's inquiry may produce no useable result if its findings are inconsistent with the FCC's determinations.

Second, the parties' state law claim is completely without merit. There is nothing in Massachusetts law – and the carriers point to no provision – which gives the Department authority to carve out a single service and create an unbundling obligation out of whole cloth. Moreover, with respect to Verizon MA's PARTS-like service, the Department would not have jurisdiction to order unbundling because the service is interstate. Verizon MA's initial offering will utilize Asymmetrical DSL ("ADSL") technology. ADSL service specifically provides a high-speed, packet data connection, rather than a circuit-switched, dial-up connection. Like DSL transport services, this type of packet service will be used primarily to connect to the Internet. The FCC has long held that in the environment of the Internet, traffic is predominantly "interstate" for jurisdictional purposes. While some competitors have argued that Internet traffic delivered using ADSL service should be treated as two distinct calls, the FCC has repeatedly rejected those arguments and instead determined jurisdiction on the "end-to-end" nature of the communication. The same rationale applies in the case of Verizon MA's PARTS-like offering. Finally, any unbundling under state law would have to be consistent with the Act and the FCC rules. With respect to advanced services such as packet switching, the FCC has found no unbundling obligation as a general matter. It reached this conclusion for a variety of reasons, including the extent of competition in the advanced services market and the need to minimize both regulation of broadband services and regulatory uncertainty in order to promote investment and innovation.<sup>3</sup> State unbundling requirements placed on advanced services would frustrate these federal policies and would not be lawful under the Act.

Finally, the bulk of AT&T's comments are devoted to its claims that the Department should examine the unbundling of Verizon MA's PARTS-like offering based

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<sup>3</sup> See e.g., *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, at ¶¶ 307, 316.

on its “unified” loop theory. AT&T Comments at 3-8. According to AT&T, Verizon MA’s PARTS-like service does not involve packet switching functionality – which the FCC has ruled is not subject to the unbundling obligation except in limited circumstances – but is simply a fiber-fed “unified” loop. AT&T’s claim seeks nothing less than a reversal of current FCC rules relating to the unbundling of this technology and provides no basis for further Department investigation.

In the FCC’s Triennial Review, AT&T is arguing that the current FCC rules limiting the unbundling of packet switching technologies should be changed to exclude DSLAM capabilities at the remote terminal. *See Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, et al. CC Docket No. 01-338 et al., Comments of AT&T dated April 5, 2002 at 163-202. This is precisely the same argument that AT&T raises here in support of its contention that Verizon MA’s PARTS-like service should be unbundled as a “unified” loop. The Department cannot, however, modify the FCC’s rules as AT&T suggests. AT&T and others, including Verizon, are addressing the “unified” loop theory relating to packet switching in the Triennial Review, and the FCC will decide the matter. The Department should not take on this issue. Moreover, as noted above, the purpose of this proceeding has been to address unbundling under the FCC’s existing rules. Until the FCC acts to modify those rules, Verizon MA’s PARTS-like service is not subject to unbundling unless specific conditions are satisfied. There is nothing on the record here which establishes that those conditions are met. Again, the *US Telecom* decision calls into question any unbundling requirement for advanced services, and the Department should take no action but should await further review by the FCC.

Not only do the carriers urge the Department to duplicate the FCC’s efforts to address unbundling of advanced services, but AT&T wants entirely new issues considered in the case. Incredibly, AT&T even asks that the Department become involved in designing Verizon MA’s network.<sup>4</sup> Specifically, AT&T urges that the Department address whether Verizon MA should be required to deploy a capability in its PARTS-like service for packetizing voice as well as data signals at remote terminals and provide for so-called electronic loop provisioning. Nothing in the Act, FCC rules, or Department decisions authorizes a competitor to demand that a specific technology or capability be deployed so that it may then be unbundled. It is plain that AT&T’s motive here is to maintain its dominant position as a broadband provider in Massachusetts by attempting to tangle Verizon MA’s technology deployment and competitive response in

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<sup>4</sup> AT&T also raises for the first time in this proceeding the issue of a line splitting arrangement in which a CLEC provides the voice service and Verizon MA provides the data service. AT&T’s Comments at 17-19. AT&T’s effort to interject this new and unrelated issue into this case under the guise of commenting on the specific questions posed by the Hearing Officer is completely inappropriate and should not be given any consideration by the Department.

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regulatory knots. The Department should not look for ways to micro-manage or micro-engineer Verizon MA's network. Regulation that seeks to design services or specify underlying technology stifles innovation and is just poor public policy. AT&T's request is completely unwarranted and should be rejected by the Department.

In summary, the other parties are asking the Department to duplicate efforts that the FCC must take in response to the *US Telecom* decision and that are already underway in other federal proceedings. The Department should not do so but should await the FCC's guidance. In addition, the Department should reject parties' requests to expand this proceeding to address new issues that go well beyond existing FCC rules. If the Department wishes to proceed with this investigation, it should stick with the approach it adopted at the outset of applying existing FCC rules and considering the legal, technical, and operational issues associated with parties' proposals for implementing those rules.

Very truly yours,

Bruce P. Beausejour

cc: Jesse Reyes, Esquire, Hearing Officer  
Michael Isenberg, Esquire, Director-Telecommunications Division  
Attached Service List